AOSE ADVISORY COMMITTEE

MEETING MINUTES:

June 12, 2007

On June 12, 2007, the AOSE Advisory Committee met in the Fifth Floor Conference room of the Office of Environmental Health Services, 109 Governor Street, Richmond, Virginia 23219. The following committee members attended in person or via polycom:

- Dan Horne, Virginia Department of Health
- Curtis H. Moore, AOSE, CPSS;
- Chip Dunn, P.E., AOSE
- Pam Pruett, AOSE;
- Neal Spiers, AOSE, CPSS;
- Dwayne Roadcap, Facilitator, VDH-Division of Onsite Sewage & Water Services; and

The following committee members were not present:

- David Fridley, Virginia Department of Health
- Stuart McKenzie, local government
- Phil Dunn, AOSE;
- Andre Fontaine, P.E., Real Estate Agent;
- Ray Wilson, contractor
- Frances Wright, contractor
- VACANT POSITION: VDH
- VACANT POSITION: VDH
- VACANT POSITION: SURVEYOR

Handouts for the meeting included the following:

1. Meeting agenda;
2. Future Discussion Topics

Committee Purpose: The Advisory Committee makes recommendations to the Commissioner of Health on policy, procedures, and regulations for the Authorized Onsite Soil Evaluator (AOSE) program. The committee's discussion and recommendations are only limited by what the Committee wishes to address. Committee members and stakeholders may attend meetings via remote locations through the health department's video-conferencing system.

Committee Decisions: The committee reaches all decisions using a "full-consensus" mechanism, meaning that all members in attendance must agree before a

recommendation is sent to the Commissioner. Members who do not attend a meeting are expected to support their fellow members on decisions reached in their absence.

Ground rules:

1. Respect all views and welcome new ideas.
2. Participate, be candid, and avoid personal attacks.
3. Be respectful when you have the floor. Keep comments pithy and concise. Limit speaking time to assure that all members have an opportunity to be heard.
4. Listen for new understandings and offer new perspectives.
5. Focus on agenda and topic. Assist facilitator and chairperson in keeping the discussion focused and on topic.
6. Avoid "side bar" conversations and hidden criticism.

The Committee will seek non-committee input on an as-needed basis. The facilitator or chair person may recognize a non-member.

Committee Discussion and Recommendations:

The committee's first discussion dealt with local ordinances. One person noted that Goochland County was looking to pass a local ordinance that would prohibit the use of alternative systems there. This person said that VDH would be compelled to issue permits that complied with state requirements even if the application did not comply with local rules. Another person stated that the state health department signs contracts with local governments to implement local ordinance rules. The problem of addressing local ordinances appeared to be beyond the scope of the advisory committee. Nevertheless, one person stated that there needed to be a chain of command at the local health department to determine whether a proposal complied with a local ordinance. Was the health department supposed to be interpreting local ordinances? What made the health department the best expert to interpret and enforce a rule developed through a local government process? Most persons attending the meeting agreed that local health department staff needed to evaluate compliance with local ordinances during the Level 1 (paperwork) review.

The committee discussed whether completion statements from well drillers and septic contractors could have the same weight as provided by AOSE completion statements. Under GMP #95, owners could avoid contractor completion statements by signing a waiver. Why was there a different standard? One person stated that when GMP #95 was adopted, VDH would have already inspected the system or well's construction. However, now, VDH may not have even stepped onto the property. To assure that it was performing its due diligence, this person felt that VDH had to require a completion statement from the inspector. There was a higher level need for the AOSE completion statement who would be acting as the inspector (VDH's role when GMP #95 was issued).

Nevertheless, some felt that it was unfair to well drillers and septic contractors. If the rule is that an owner can do it, then quit asking for completion statements. Need some other documentation than something from the homeowner. Don't make it easy for the homeowner.

The committee discussed the purpose of the completion statement. What is the purpose of the completion statement? One person noted that the completion statement certifies compliance for those things that the VDH or AOSE may not have observed or inspected. Usually, portions of the well or sewage system are hidden from view and you can't inspect every component and part. You won't see the bottom of the ditch since it may be covered.

One person stated that in the building industry, the builder does not make an affirmation that he followed the code (i.e., sign a certification statement). Why doesn't the building inspector require the builder to sign a certification statement? What other industries ask for completion statement when someone has asked for it? Another person suggested that this was a bad comparison because there was more potential for health issues with well and septic installations. As such, more assurances were necessary. Someone noted that well drillers were treated differently than septic contractors—they rarely received an inspection while constructing or grouting the well.

Eventually, the committee decided that this discussion would be more appropriate with the Sewage Handling and Disposal Advisory Committee rather than with the AOSE Advisory committee. Roadcap stated that he would inform Tom Bashem, chair of the other advisory committee about this possible topic for discussion.

Another person asked about the ethical dilemmas that AOSEs sometimes face. For example, sometimes the AOSE notes a deficiency in the inspection but to correct it would probably cause more damage than simply leaving the mistake alone. For example, if the contractor installed the system 6-inches too deep and it was a repair on a small lot. What should you do? You can't easily correct that error. Yet, if you approve it, the system was installed 6-inches too close to a limiting feature. How should the AOSE handle this situation? Ethically, what should the AOSE do? Other examples might include installing the system off-contour. The installation started too shallow and kept getting shallower. To fix the problem would cost over $30,0000 and the only reserve is used. If the AOSE asks for a release and hold harmless agreement, there is protection financially but what about the increased risks to public health and groundwater supply? Sometimes the AOSE would rather approve the mistake than try to do expensive fixes. How should health dept. handle that?

What's the problem with saying, the contractor did not install it properly, AOSE won't approve? Would health dept. take enforcement action against the AOSE for stating that the system substantially complied to the design, when in fact, it did not? One person suggested that the AOSE could ask the owner to request a variance to approve the mistake. The variance would bless the deficiencies and it would give the health

department a mechanism for review and consideration. Another person said that it was not the health department's job to bless bad work. If the AOSE thought it needed a variance, then he should deny the inspection. Another person said that VDH would not consider this as a variance request. A variance is a request for a permission to do something not in compliance before you act. By asking for blessing after the mistake was made would lend itself to an enforcement action like a consent order.

What about situations where system complies with regulations but not with more restrictive criteria of the AOSE? AOSE could hold the installers feet to the fire if he wants to. AOSE can refuse to sign completion statement. What ground did AOSE have to deny the inspection when it complied with the regulations?

The next topic of discussion dealt with the availability of AOSEs to perform inspections. The committee liked the idea of having AOSEs sign another statement if that AOSE was inspecting the design of another AOSE. One person noted that sometimes septic contractors have agreements with certain AOSEs who they know perform less restrictive inspections. The contractor, rather than deal with the AOSE who designed the system, will call their AOSE friend to do the inspection. The AOSE regulations explicitly state that the AOSE who designed the system should inspect the system. If AOSEs were required to sign an affirmative statement stating that the AOSE who designed the system was unavailable, then the health department could take enforcement action if that AOSE were, in fact, available to do the inspection.

Someone asked, what defines "unavailable?" It could mean that you called the AOSE the morning of the inspection and the AOSE was not available that morning for the inspection. The AOSE could have been available that afternoon but the contractor wanted the inspection in the morning. Was the AOSE available? By whose standard? How would the health department enforce such a requirement? It would boil down to a "he said/she said" issue and the health department could not resolve it unless there was an explicit definition of what "unavailable" meant.

One person opined that the definition of unavailable should mean deceased, out of business, out of state, etc. Another person stated that you could not list what unavailable meant. It had so many possibilities you could not capture all of the possible reasons that someone might be reasonably unavailable. For example, what if the AOSE's child were sick? What if he were available next week but not right now. What if the AOSE hired someone who was not an AOSE to inspect systems on his behalf. Did the regulations prohibit this activity because the AOSE who designed the system was the person who was also supposed to inspect it?

Another person opined that this issue had nothing to do with public health or protecting groundwater. If a person of sufficient knowledge (AOSE/PE) inspected the system, who cared whether it was the AOSE who designed it? The interest of making sure that systems were inspected by a qualified person happened. The suggestion of adding a "gotcha stick" onto the completion statement seemed onerous and unnecessary. It would

be unlikely that the health department would take enforcement action against an AOSE for inspecting a system when there was a dispute as to whether the designing AOSE was available. Did people really want the health department to hold hearings and take action against an AOSE for inspecting a system when there was a dispute as to whether the original AOSE was available? Maybe the owner simply didn't want the original AOSE back onto his property. Would that be considered unavailable?

One person asked who's financially responsible. When an AOSE signs the completion statement, he was taking a lot liability. If the AOSE who designed the system did not inspect it, then he's missed another chance to verify and confirm his original work. There are competing interests here. Who defines whether someone is unavailable? If inspecting AOSE has to take responsibility for the designing AOSE's work, then it will be unlikely that one AOSE would want to be responsible for another AOSE's work. The courts will decide who is responsible. If AOSE #1 signs the completion statement of AOSE #2's work, they are both in the mix for paying for mistakes. This is not required among other professional groups. If the AOSEs wanted to be considered professionals, then they needed to stop bickering over money issues and focus on professional needs for the program. This issue is settled among the engineering community. Why do AOSEs want to quarrel about it. It is standard practice in engineering.

One person asked whether the health department should require a brief statement of why a different AOSE did the inspection. With the above discussion, the committee examined whether the completion statement should be changed to include an affirmative statement requiring AOSEs who did not design the system to state that the original AOSE was unavailable. The AOSE would also certify that the original AOSE was not available. The committee also discussed whether the commissioner should change VDH's implementation manual to include a question that must answered by the AOSE who inspects and approve any sewage system. The question is:

Are you the AOSE who issued the permit? If no, state why?

One person said that if the problem were about money, then AOSEs could solve that problem by charging for their inspection up front. If the owner wanted to pay twice for the same inspection, so be it. Inspections should be open-market to assure market forces were in play. Another person pointed out that it was not a money issue; rather, it was an issue of accepting responsibility for someone else's inspection that may have special relationship with the installer. The regulator can pull the license, the courts handle the money side. One person stated that he did not like the idea of AOSE #2 accepting full responsibility for AOSE #1's work if doing just an inspection. AOSE #2 is not doing a soil evaluation.

Most people thought that better quality control could occur with AOSE #2 inspecting the work of AOSE #1. Other potential conflicts existed, such as:

AOSE also installer

AOSE also distributor
AOSE working for company with installers
AOSE also working as service provider

One person noted that there were architecture and design/build firms in the marketplace. They provided a valuable service. People liked one stop shopping for design, build, and maintain services. One person was accountable for any problem. You didn't have to worry about finger pointing. In the engineering community, such activity happens a lot. Why were AOSEs trying to solve problems that were already solved in the engineering profession?

Would it help if the health dept. were doing inspections on all systems again? The best time for health department to be involved might be at the time of inspection. They can come back to check as-built, final grade, and provide a quality control point. Logistically, a return to such activity might create a nightmare to coordinate two open ditch inspections at the same time.

For AOSEs who were designing and installing appropriately, it shouldn't be a problem to have the health department there at the time of final inspection. Health department needed checks and balances in the system, which appears to be missing when AOSEs, design, build, and inspect their own work. Private side cannot work with health dept. doing inspections. No need for 2 inspections for the same purpose.

What about AOSEs who work for a builder? Who would want all of that responsibility and liability? What about AOSE who owns stock of publicly traded installation company? Is there a conflict of interest? There are different degrees of ownership. How can you write any regulation to show all of the nuances and perturbations that might exist? Should this be covered with the Department of Professiaonal and Occupational Regulations (DPOR) as they develop these regulations? Maybe DPOR could define disclosures and conflicts better.

The committee discussed whether the AOSE regulations or policy should be amended to require AOSEs to disclose all potential conflicts of interest. All of this will be faced by DPOR with its Board for Waterworks & Wastewater Works. I think DPOR will do what people ask of them rather than do what they would think best. DPOR's scope may not be as broad as the health department's scope. Did they have a contract? Did they perform in accordance with the contract? The answers will depend on the regulations that DPOR will develop. Someone noted that he did not think DPOR would fix or solve this issue because these are very difficult problems. Another person reminded people that it was called the Board FOR Contractors, not the Board for processing complaints and solving ethical dilemmas.

If Health Department required AOSEs to disclose conflicts of interest to the Health Department, then the health department could use that information as a tip-off to do a

Level 2 inspection of the AOSE's work. You could go 2-3 years with a lot of failures because the revelation of a problem did not happen until quite later.

One person asked whether David Dick might have an opinion on this topic. Until DPOR develops regulations for AOSEs, some thought that the health department should take action in the interim period. Could the health department get an opinion from OAG on this? What the limits of the health department's authority? Can the health department prohibit AOSEs from being design/build/inspect companies? If the health department can, should it?

Usually a contractor's license is held by a company, which holds dual licenses under different DPOR boards. There are people who hold contractor and asbestos licenses for example. Have to hold both licenses. DPOR's stance is that you can hold multiple licenses. So AOSE could hold multiple licenses. DPOR protects the rights of the people in the professions. It's not a consumer protection agency. They are the Board FOR contractors. Design/build does provide convenience, and one place to go. The appearance of a conflict is not necessarily a conflict.

Why does the health department allow AOSEs to hire a subordinate to do an inspection, which he then signs responsibility for? Physician cannot have someone else do the evaluation and then sign off on it. If AOSEs are recognized as professional practitioner, then how can they be permitted to do this activity?

The company doesn't have a seal, just a license that they are practicing engineering and have a list of engineers working for the company. That's set forth in the regulations (PC or PLLC). An AOSE could hire engineer and the AOSE's company would have to register with DPOR that his firm is doing this and here is the PE doing it. The individual's license is easier to pull than a company license. You can't throw a company in jail.